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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-426

ANGELO GARZIA and JOANNE CONNOLLY GARZIA,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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Facts

Sometime between July 3 and July 9, 1975, a confidential informant of the Westchester County Sheriff's Office and the New York City Police Department went to the house where the defendant and his family resided. The informant was observed, by an officer of the Sheriff's Office, entering the premises and then exiting. At the time of the entry, the informant had no marijuana on his person and when he exited he carried a plastic bag containing a brownish substance which the experienced narcotics officer, for stated reasons, believed to be marijuana. In addition,

the informant, who had previously given reliable information and had gone to the premises to purchase marijuana told the officers that he had bought the marijuana from Basil Garzia, a resident of the premises.

The warrant was signed and executed on July 9, 1975. The officers seized varying amounts of marijuana from the rooms occupied by Angelo Garzia (in which Joanne Connolly was present), Basil Garzia, Pamela Garzia and Ronald Costello.[1]

POINT I

The petition is not timely.

The order of the New York Court of Appeals was signed on May 31, 1978[2] and filed in the office of the clerk of that court on that day (CPLR § 5525(a)). The case was remitted to the County Court of Westchester and the order filed in the office of the clerk of that court on June 5, 1978. The last day to file a petition for certiorari was August 29, 1978 (Revised Rules of the Supreme Court of the United States, Rule 22), the petition was not filed until September , 1978.[3]

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[1] Pamela Garzia plead guilty to attempted criminal possession of a controlled substance in the seventh degree. Basil Garzia and Ronald Costello plead guilty to criminal possession of a controlled substance in the seventh degree.

[2] The copy of the decision to which petitioner refers in his jurisdictional statement is one which was filed by the District Attorney to indicate additional service by him on counsel.

[3] The District Attorney received the petition on September 11, 1978.

POINT II

The judgment of the New York Court of Appeals is not final.

The defendant invokes jurisdiction under 28 U.S.C. 1254(1). However, the instant case was not heard by a court of appeals and the section does not give jurisdiction. Jurisdiction would lie only under 28 U.S.C. 1257(3) which mandates a final judgment. There has been no trial in the instant case and hence no final judgment. As the decision by the state court is one merely "determining the admissibility of evidence in, the state proceedings still to come," the exceptions to the finality rule do not apply. (*Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975)).

POINT III

The search warrant was properly issued.

A confidential informant of the New York City Police Department and the Westchester County Sheriff's Office carrying no marijuana, entered the defendant's premises to purchase marijuana (B-7). The informant exited the premises carrying a brownish substance which had the odor of and appeared to be marijuana (B-4). Based upon the texture, odor and burnt odor of the substance, the applicant, who was an experienced narcotics officer, concluded that the substance was in fact marijuana (B-6).

Insofar as a search of the Garzia premises was concerned (and that is the only search with which the defendants are concerned), the above was sufficient to support the issuance of a search warrant for marijuana. Additionally, the informant, who had previously proven his reliability (B-7), told the officers that he had purchased the marijuana from Basil Garzia (B-4), a resident of the premises (B-3).

While the application may have been inartfully drawn, that is not cause to find the warrant invalid. The officer set forth facts from which a determination that probable cause for the issuance of a search warrant existed could properly be made by the magistrate. The search warrant was properly issued on an application setting forth probable cause (*United States* v. *Ventresca,* 380 U.S. 102 (1965)).

The defendant argues that the fact that the application was based solely upon information and belief was a violation of his constitutional rights. The application was not solely so based and even had it been, would have been sufficient (*United States* v. *Ventresca, supra*). In any event, whether or not the informant must be identified is solely a question of state law and not one of constitutional dimension (*McCray* v. *Illinois,* 386 U.S. 300 (1967)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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